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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 669

WILLIAM A. ALBAUGH, *Petitioner*,

v.

DISTRICT OF COLUMBIA GOVERNMENT, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM A. ALBAUGH
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Petitioner, Pro Se

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, dated December 17, 1959, affirming the judgment of the District Court for the District of Columbia, entered April 3, 1959, dismissing petitioner's "Complaint For Conflict of Interest" seeking to restrain the respondents from

conducting fund-raising campaigns for private charitable organizations at Government expense, seeking to invalidate the recommendation of the Department Director for the dismissal of the petitioner from his probationary position of Statistical Draftsman GS-3 in the Department of Vehicles and Traffic, and seeking damages for the derogatory charges made in the official notice of dismissal.

The judgment of the District Court is found on page 24 of the record on appeal. The judgment of the Court of Appeals is found on page 3a of this petition's appendix.

OPINIONS

The findings of fact and the conclusions of law of the District Court are found on pages 22-24 of the record on appeal. The opinion of the Court of Appeals is found on page 2a of this petition's appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1959 (Pet. App. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether respondents' dismissal of petitioner from Government employment on unfounded dismissal charges, following petitioner's refusal to grant respondents' request for a contribution to a private charitable organization, was a violation of the solicitation act, United States Code, Title 18 Sec. 202.

CONSTITUTIONAL AND STATUTORY LAWS INVOLVED

The constitutional and statutory laws involved are: Constitutional Amendment, Art. X and United States Code, Title 18 Sec. 202. These laws are found on page 1a of this petition's appendix.

STATEMENT OF THE CASE

Relying upon 28 U.S.C. 1331 the petitioner William A. Albaugh, a citizen of the State of Maryland, filed on January 20, 1958, a "Complaint For Conflict of Interest" which was subsequently amended on April 3, 1958 and July 1, 1958 (R. 4-7, 8-9, 10) in the United States District Court for the District of Columbia seeking to restrain the respondents from conducting fund-raising campaigns for private charitable organizations at Government expense (R. 13-19), seeking to invalidate the recommendation of the Department Director for the dismissal of the petitioner from his probationary position of Statistical Draftsman GS-3 in the Department of Vehicles and Traffic (R. 20), and, seeking damages for the derogatory charges made in the official notice of dismissal (R. 20).

Petitioner alleged that, while employed in a probationary status as a statistical draftsman by the Traffic Engineering Division of the Department of Vehicles and Traffic of the District of Columbia Government, he and his fellow employes were, on October 10, 1957 and November 19, 1957, called away from their assigned duties by their supervisors, respondent Mitton, the head of the Traffic Engineering Divison, and respondent Keneipp, the Director of the Department of Vehicles and Traffic, and asked to make contributions to various private charitable

organizations through the "D. C. Third Annual One Fund Drive" (R. 17).

On January 7, 1958, petitioner was notified that, upon the recommendation of respondents Mitton and Keneipp, he was recommended to be separated from his position as a probationary employe. The official causes given for his separation were:

> "(a) Failing to demonstrate adequate ability to perform assigned duties in the preparation of collision and condition diagrams.
>
> "(b) Being a source of disturbance to co-workers by continually leaving assigned work area to converse with them on subjects unrelated to assigned duties."

Petitioner alleged that the official causes given for his dismissal were not true and constituted "malicious libel per se" and that the obvious reason for his dismissal was his open opposition to the "One Fund Drive."

On April 3, 1959, the District Court entered judgment for the defendants-respondents on the grounds that (1) respondents are not prohibited by statutory or constitutional law from participating in the fund raising campaigns challenged in the complaint; (2) respondents had authority under law to discharge petitioner from employment with the District of Columbia Government, and (3) respondent Mitton's recommendation that petitioner be dismissed did not constitute libel (R. 22-24). The petitioner appealed (R. 25), and on December 17, 1959, the Court of Appeals for the District of Columbia Circuit, failing to find a reversible error, affirmed the judgment of the lower Court (Pet. App. 3a).

ARGUMENT AMPLIFYING REASON RELIED ON FOR GRANTING THE WRIT

Petitioner Respectfully Submits That This Court Should Settle Whether Respondents' Dismissal of Petitioner From Government Employment on Unfounded Dismissal Charges, Following Petitioner's Refusal to Grant Respondents' Request for a Contribution to a Private Charitable Organization, Was a Violation of the Solicitation Act, United States Code, Title 18 Sec. 202

The solicitation act (App. 1a) provides briefly that any government employe who solicits funds for unofficial purposes with intent to have an official act influenced thereby shall have committed an unlawful act. Technically this law is unenforceable because mental states like "intent" are beyond proof by material evidence. However, the Courts as a matter of common practice rely upon this law to invalidate all contested unwarranted official acts which follow related unofficial solicitations.

In this case it is the petitioner's contention that his dismissal (R. 20) was an unwarranted official act, that it followed a related unofficial solicitation, and that the dismissal should be invalidated.

The primary issue of fact is whether the dismissal charges were true (R. 10 paragraph 13). Since no substantiating evidence was presented to the Trial Court by the respondents who had the burden of proof in accordance with the rule set forth in *Lilienthal's Tobacco* v. *U. S.*, 97 U.S. 237, 24 L. Ed. 901 (1877),

> "The burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue,"

the unsubstantiated dismissal charges were by default established as unfounded and the dismissal based upon them established as unwarranted.

The primary issue of law is whether the respondents had Constitutional authority to request the petitioner to make a donation to a private charitable organization. It is the petitioner's contention that government solicitation programs for the benefit of private charitable organizations, and particularly the Executive Order No. 10728 (R. 13) and the Commissioners' Order No. 55-702 (R. 16) authorizing these programs, are without Constitutional authorization and are in conflict with Constitutional Amendment, Art. X which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or the people,"

and which was interpreted in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 96 L. Ed. 1153 (1952), to mean:

> "The Government of the United States was created by ratification of the Constitution, and it derives its authority wholly from the powers granted to it by the Constitution which is the only source of power authorizing action by any branch of the Government."

In this case the petitioner was asked by order of the respondents to contribute to a private charitable organization called the United Givers Fund (R. 23) and when he refused to contribute he was dismissed from government employment. If there was no Constitutional authorization for the program, this request for

funds was an unofficial solicitation. If the dismissal was based upon unfounded dismissal charges, it is only reasonable to conclude that the dismissal was really caused by the petitioner's refusal to submit to the respondents' unofficial solicitation which preceded the dismissal and that the dismissal should be invalidated.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari as prayed for should be granted.

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Petitioner, Pro Se

February 1960

APPENDIX

Constitutional and Statutory Laws Involved

I. Constitutional Amendment, Art. X

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

II. United States Code, Title 18, Sec. 202

"Acceptance or solicitation by officer or other person.

"Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any Committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States . . ." (June 25, 1948, ch 645 Sec. 1, 62 Stat. 691.)

(Filed December 17, 1959)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,183

WILLIAM A. ALBAUGH, *Appellant*,

v.

DISTRICT OF COLUMBIA, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia

Decided December 17, 1959

Opinion

Mr. William A. Albaugh, appellant pro se.

Mr. Richard W. Barton, Assistant Corporation Counsel for the District of Columbia, with whom Messrs. Chester H. Gray, Corporation Counsel, Milton D. Korman, Principal Assistant Corporation Counsel, and Hubert B. Pair, Assistant Corporation Counsel, were on the brief, for appellees.

Before: WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

PER CURIAM: Appellant was separated from his position as a probationary employee in the service of the District of Columbia. He thereafter brought suit in the District Court for reinstatement and other relief. Named as defendants were the District of Columbia and certain of appellant's former superior officers. After a trial, the court entered judgment for defendants-appellees. We find no reversible error.

Affirmed.

(Filed December 17, 1959)

Before: WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the Judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellees herein recover from appellant their taxable costs on this appeal, and have execution therefor.

Per Curiam.

Dated: December 17, 1959

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BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

October Term, 1959

No. 669

WILLIAM A. ALBAUGH, *Petitioner*,

v.

DISTRICT OF COLUMBIA GOVERNMENT, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF QUESTION PRESENTED

Was petitioner, while a probationary employee of the District of Columbia Government, deprived of any constitutional or other legal right when, for stated reasons and after procedures admittedly in accordance with law, he

was, during the probationary period, separated from his employment?

STATEMENT OF THE CASE

By "Complaint for Conflict of Interest" filed in the United States District Court for the District of Columbia on January 20, 1958 and thereafter amended, petitioner sought to enjoin respondents from conducting, participating in or supporting the solicitation of funds for the United Givers Fund. Petitioner sought also damages in excess of one million dollars for libel in connection with the service of notice of the termination of his employment with the District of Columbia Government (R. 4-7, 8-9, 10).

At the trial on March 10 and 11, 1959 it was undisputed that petitioner, while a probationary employee of the District of Columbia Government, was on January 7, 1958 served with notice of the termination on January 24, 1958 of his employment for the reasons:

> "(1) Failure to demonstrate adequate ability to perform assigned duties in the preparation of collision and condition diagrams.
>
> "(2) Being a source of disturbance to co-workers by continually leaving assigned work area to converse with them on subjects unrelated to assigned duties." (R. 20)

On April 3, 1959, the trial court made detailed findings of fact and conclusions of law to the effect, *inter alia*, that respondents were not prohibited by statutory or constitutional law from supporting or participating in the fund raising campaigns challenged in the complaint; that respondents did not, by any such support or participation in fund-raising campaigns, violate any of petitioner's constitutional rights; that respondents did not violate any of petitioner's statutory or constitutional rights when, during

the probationary period, they separated him from his employment; and that the recommendation which was the basis for the personnel action was a privileged communication within the scope of official duties and, in any event, did not constitute libel (R. 22-24).

Judgment was accordingly entered for the respondents. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit which affirmed the judgment of the District Court (Petitioner's Appendix 3a). There followed the petition to this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ARGUMENT

Because no substantial local or national question is presented, the petition for writ of certiorari should be denied.

Involved in the proceedings below was administrative action by respondents which resulted in the separation of petitioner from probationary employment in the service of the District of Columbia Government (R. 20). It is crystal clear from the record that no substantial local or national question is presented, rather that this case involves no more than a question arising out of routine personnel action. Petitioner contends nevertheless that certain of his constitutional or statutory rights were violated by such administrative action. Specifically, petitioner says at page 4 of his brief that the "* * * official causes given for his dismissal were not true and constituted 'malicious libel per se' and that the obvious reason for his dismissal was his open opposition to the 'One Fund Drive,'" which he insists was conducted or supported by respondents without constitutional or statutory authorization.

In this connection, however, petitioner conceded that, as a probationary employee of the District of Columbia Government, he was "subject to instant dismissal without Civil Service appeal rights" (R. 21). Moreover, the trial court concluded from its detailed findings (R. 22-24) that re-

spondents did not, by the administrative action complained of, violate any of petitioner's employment rights and that petitioner was deprived of no constitutional or statutory right by either his dismissal as a probationary employee of the District of Columbia Government or by respondents' support of, or participation in, the challenged fund-raising campaigns (R. 24). The United States Court of Appeals for the District of Columbia Circuit found no reversible error and affirmed the judgment of the trial court (Petitioner's Appendix 2a - 3a).

From the foregoing, the conclusion seems compelled that the questions resolved by the court below were of purely local significance in the discharge of administrative duties in a routine personnel matter. What petitioner has attempted unsuccessfully to do is to convert this case into one involving a non-existant constitutional issue. As this Court said in *United Surety Company* v. *American Fruit Product Co.*, 238 U. S. 140, 59 L. Ed. 1238, 35 S. Ct. 838, at page 142:

> "The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here."

This Court has consistently refused to review decisions of the courts of the District of Columbia, absent a showing of egregious error in resolving a serious question of general public importance. See *American Security and Trust Co.* v. *District of Columbia*, 224 U. S. 491, 56 L. Ed. 856, 32 S. Ct. 553. See also and compare: *Del Vecchio* v. *Bowers*, 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190; and *Ford* v. *District of Columbia*, D. C. Mun. App., 102 A. 2d 838, aff. 95 U. S. App. D. C. 87, 219 F.2d 769, cert. den. 349 U. S. 964, 99 L. Ed. 1286, 75 S. Ct. 897.

CONCLUSION

Petitioner has presented nothing of substance to establish that this case is within the class of cases contemplated

by Rule 19 (b) of the Rules of this Court so as to warrant the exercise of this Court's jurisdiction to review on writ of certiorari. Respondents, therefore, respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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